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FEDERAL COMMUNICATIONS

Before the  
FEDERAL COMMUNICATIONS COMMISSION

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Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 93-51 ✓
	)	
MARTHA J. HUBER	)	File No. BPH-911114ME
	)	
RITA REYNA BRENT	)	File No. BPH-911115MC
	)	
MIDAMERICA ELECTRONICS SERVICE, INC.	)	File No. BPH-911115ML
	)	
STATON COMMUNICATIONS, INC.	)	File No. BPH-911115MU
	)	
For Construction Permit for a	)	
New FM Station on Channel 234A	)	
in New Albany, Indiana	)	

MEMORANDUM OPINION & ORDER

Issued: May 17, 1993; Released: May 18, 1993

Background

1. This is a ruling on a Petition To Enlarge Issues that was filed on April 14, 1993, by Martha J. Huber ("Huber"). An Opposition To Petition To Enlarge was filed on May 3, 1993, by Midamerica Electronics Service, Inc. ("Midamerica"). A Reply To Opposition To Petition To Enlarge was filed by Huber on May 12, 1993.

2. Huber seeks the addition of the following issues against Midamerica:

To determine whether Midamerica is financially qualified to construct and operate its proposed station;

To determine whether Midamerica falsely certified in its application that it was financially qualified;

To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Midamerica is qualified to construct and operate its proposed station.

For the reasons stated below, only issues relating to Midamerica's financial ability will be added.

Facts

3. In Section III of its Form 301 application filed on November 15, 1991, Midamerica submitted an estimate of \$85,000.00 needed to construct and operate its station at New Albany. Huber submits relevant copies of the financial disclosures of four other applicants for comparison which reflect an

average cost estimate of approximately \$345,000.00. Huber contends that the difference of \$260,000.00 establishes a prima facie unreasonable estimate which requires the addition of qualifying and character issues against Midamerica.

4. Huber has relied on matters of record and has not submitted an affidavit. Huber has filed the motion within 30 days of the release of the designation order and that calculated date is not disputed. See 47 C.F.R. §1.229 (b)(1). According to data contained in the application, Midamerica proposes to build a 111 foot guyed tower. Midamerica proposes to use an approved transmitter and a three bay antenna.

5. Midamerica has submitted a sworn declaration of its principal Peter C.L. Boyce ("Boyce"). Boyce relies on his expertise in communications engineering and the fact that Midamerica is in the business of installing and maintaining equipment at broadcast stations. He claims to have dealer relationships with certain equipment manufacturers. Boyce completed the application of Midamerica for the New Albany allotment, including the engineering and the cost estimate. Specifically, Boyce represents:

Prior to completing the application, I determined what equipment Midamerica would need to build the station, what it already had on hand and the cost of obtaining the rest. (For example, Midamerica already has a used transmitter and tower, ready for installation). Since Midamerica and I are in the business of building broadcast facilities and remodelling them, and since Midamerica is a dealer for certain manufacturers, estimating the cost of construction of the station was not the major task that it would be for someone who had never built a station. Then, considering the programming I had in mind, I estimated the cost of running the station for three months without revenue.

See Declaration Of Peter Boyce dated April 29, 1993, at 1-2.

#### Discussion

6. Midamerica contends that the new issues should not be added because of a procedural infirmity, i.e., that Huber failed to submit an affidavit that is based on personal knowledge. Huber relies on the fact that the information is contained in official records of the Commission for which judicial notice is requested. The applicable Commission rule provides:

Such motions --- shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof.

47 C.F.R. 1.229(d).

7. The applicable provision of the Federal Rules Of Evidence ("FRE") authorizes official notice when the facts are undisputed or easily verifiable.

FRE 201(b). Compare Midwest TV, Inc. v. F.C.C., 426 F.2d 1222, 1229-30 (D.C. Cir. 1970) (official notice generally reserved for undisputed facts or those easily verifiable). The FRE generally govern Commission hearing proceedings. 47 C.F.R. §1.351. See Newton Television, Ltd., 3 F.C.C. Rcd 553, 557 (Review Bd 1988). Therefore, the undisputed facts in the application of Midwest are appropriate for official notice of the operative facts alleged by Huber relating to the adequacy of Midamerica's financing. However, there is no nexus shown between Midamerica's justification for its certification and an intention to misrepresent. Nor does there appear to be any indication of an intention to conceal a scheme to mislead the Commission or the parties. There would be no basis to assess a penalty merely for erroneously estimating costs. And without evidence of such a scheme being flushed out through facts alleged in an affidavit, there is no substantial fact raised of an intent to mislead and none will be inferred.

8. The financial certification was made based upon Boyce's conclusions about his expertise and his rationalizations of how he might economize. However, the Commission requires that prior to a certification there must be serious and reasonable efforts to ascertain "predictable construction and operation costs." Northampton Media Associates, 4 F.C.C. Rcd 5517, 5519 (Comm'n 1989). There was no evidence of such an objective analysis. In fact, the budget and cost estimates process was not believed to be a "major task" by Boyce when he undertook to certify. There are sufficient circumstances shown that will support a substantial question of fact with respect to the accuracy of Boyce's estimate.

9. The fact that these same facts were ascertainable before the hearing designation order was released without an added financial issue does not prevent an issue from being added at this time. It is only where the Bureau has made a reasoned analysis in the designation order that the Presiding Judge is bound by the analysis. Atlantic Broadcasting Co., 4 F.C.C. 2d 943 (Review Bd 1966). See also Ft. Collins Telecasters, 103 F.C.C. 2d 978, 983-84 (Review Bd 1986). Since there was no such analysis, and in view of the disparity between Midamerica's estimated costs and the estimates of the other applicants having a stake in the outcome here, it is found to be appropriate to add an issue on the reasonableness of the assurance that Midamerica was and is financially qualified to construct and operate an FM station at New Albany. This situation is distinguished from the case relied on by Midamerica, California Stereo, Inc., 39 F.C.C. 2d 401, 402 (Review Board 1973). In that case, the Review Board had held that an applicant's cost estimates must be facially unreasonable in order to allow a cost estimate issue to be added. But the costs questioned in that case were related to salary estimates for station employees which are negotiable in a variety of ways, such as deferred compensation of principals. Here, however, the question is related primarily to equipment where the contrast with the different estimates of opposing applicants is marked by a factor of better than 200%. Cf. Columbus Broadcasting Corp., 3 F.C.C. Rcd 5480 (MMB 1988) (cost estimates found to be inherently unreasonable which were substantially lower than other applicants). It is found after carefully considering Boyce's affidavit that Midamerica's estimate is facially unreasonable.

Rulings

Accordingly, IT IS ORDERED that the Petition To Enlarge Issues filed by Martha J. Huber on April 14, 1993, IS GRANTED in part and IS DENIED in part.


IT IS FURTHER ORDERED that the following issues are added:

- A. To determine whether, at the time it filed its application, Midamerica was qualified to construct and operate its proposed FM station at New Albany, Indiana.
- B. To determine whether, at the present time, Midamerica is financially qualified to construct and operate its proposed FM station at New Albany, Indiana.
- C. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Midamerica is qualified to receive a Commission permit to construct and operate its proposed FM station at New Albany, Indiana.

IT IS FURTHER ORDERED that the burden of proceeding and the burden of proof ARE ASSIGNED to Midamerica.

IT IS FURTHER ORDERED that discovery SHALL COMMENCE within three days of the release of this ruling<sup>1</sup>; that documents identified by Huber SHALL BE PRODUCED by Midamerica within thirteen days of the release of this ruling; and that all depositions will be noticed within twenty days of the release of this ruling.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>1</sup> It is noted that Huber's Petition To Enlarge Issues has included the required request for documents which is self-executing under the new procedures. 47 C.F.R. Section 1.229(e). However, specification 5 documents are limited to those that relate to the New Albany application and the parties are required to negotiate the scope of the documents sought under specifications 6, 8 and 9.